SUPREME COURT, U. S.
73-458

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

FRANCIS ANTHONY RAGUSA, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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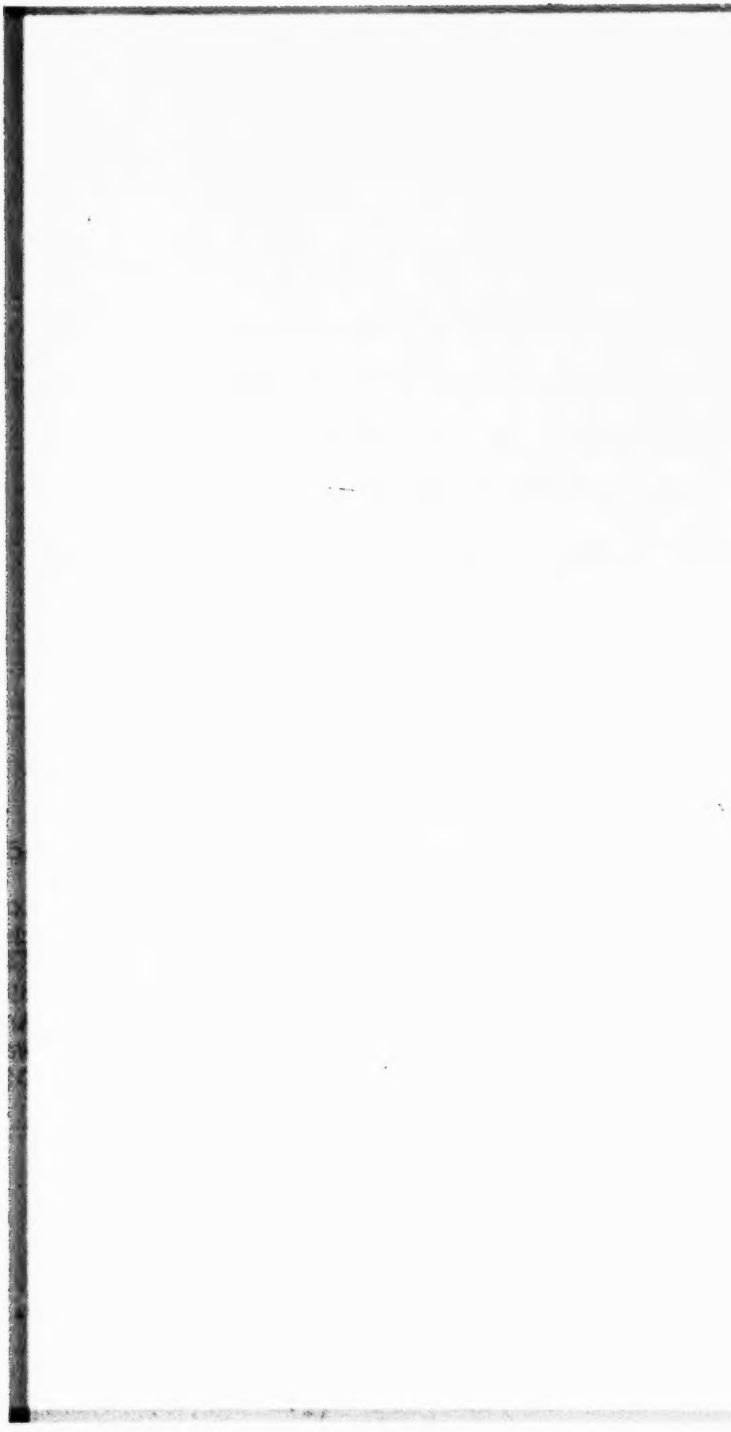
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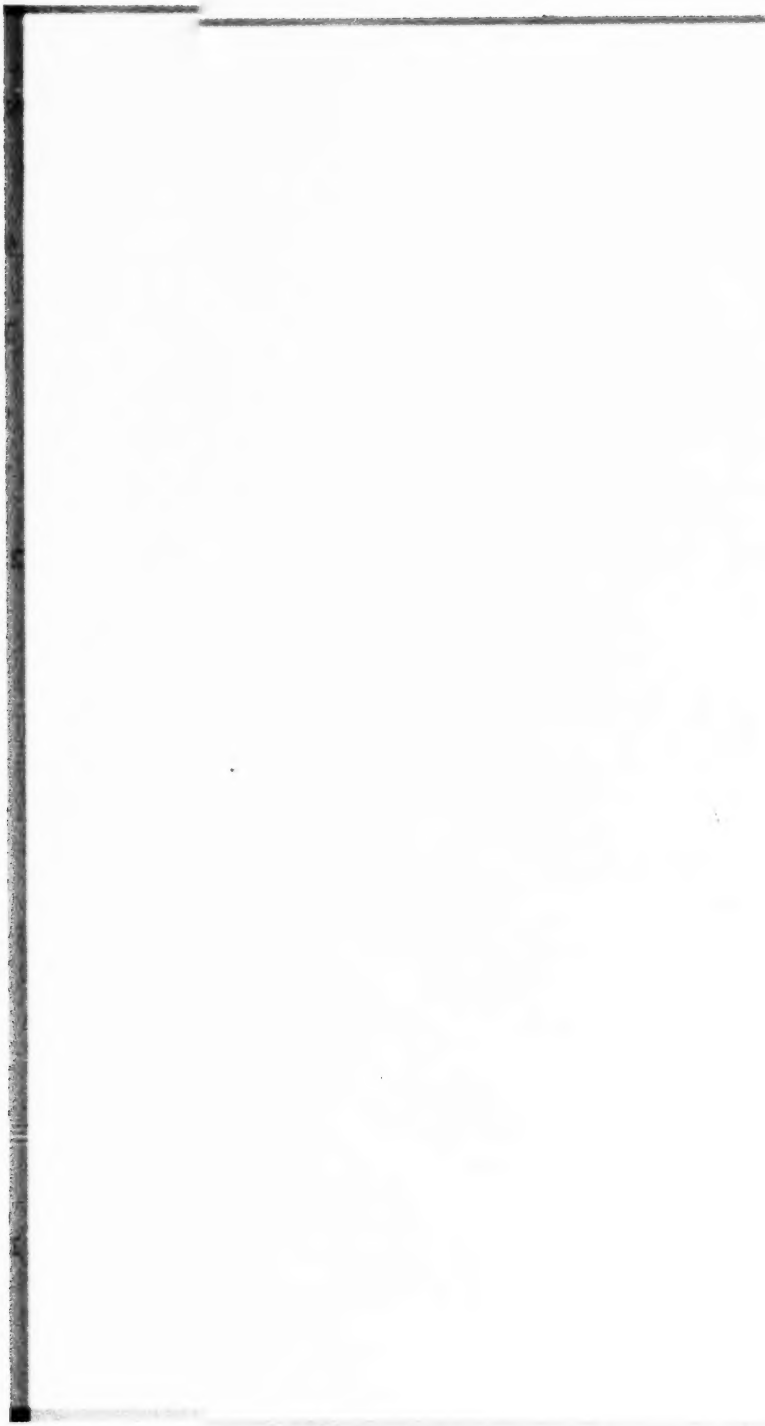
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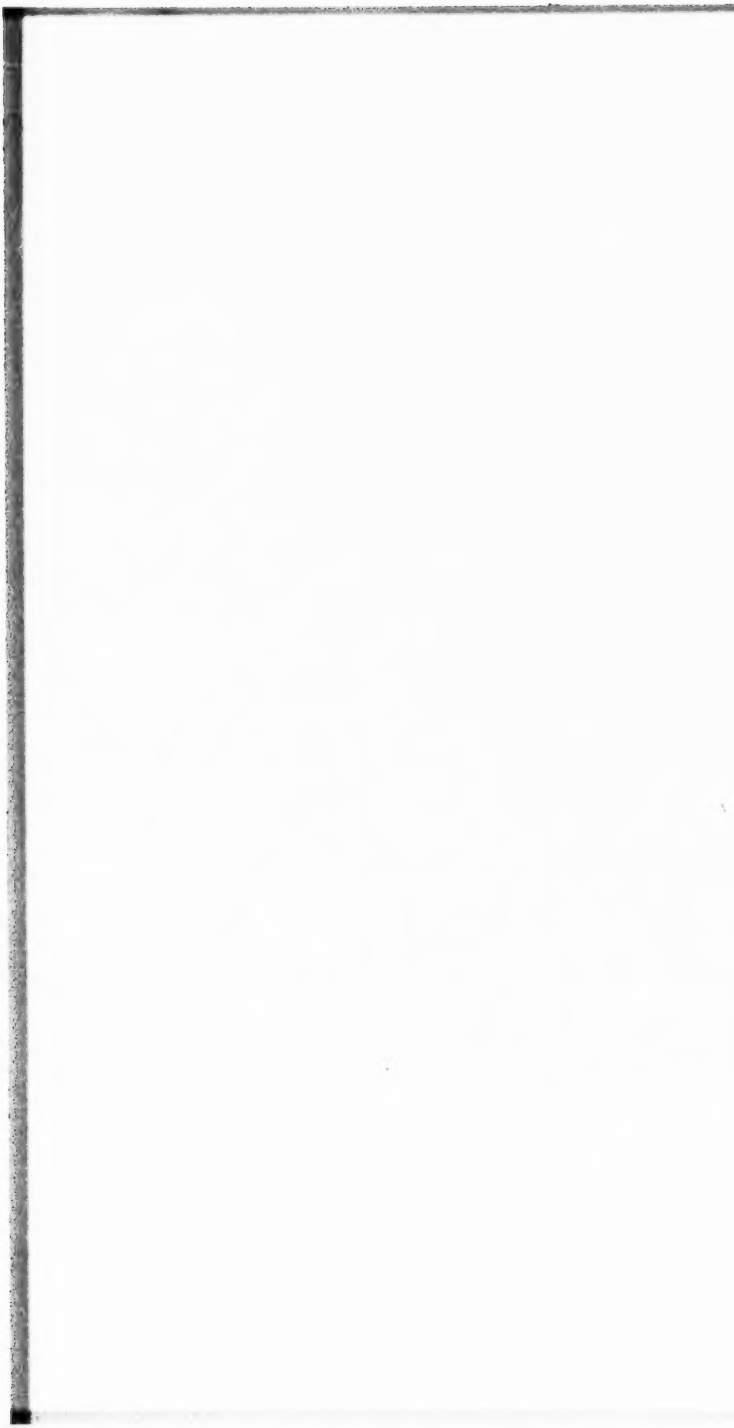
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

FRANCIS ANTHONY RAGUSA, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner FRANCIS ANTHONY RAGUSA respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 11, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit was entered on July 11, 1973. A petition to this Court for extension of time was made within 90 days of July 11, 1973 and an extension of time was granted by the Hon. William J. Brennan, Associate Justice of the Supreme Court of the United States to September 9, 1973 within which to file this petition.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. Whether the Border Patrol, at a check point, after the minimally intrusive search permitted by law, may conduct a warrantless search for contraband in luggage, not big enough to hold aliens, in the open trunk of an automobile, after an unequivocal refusal of consent to search such luggage

"(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant-...

"(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any... vehicle;..

"(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens; ...

"(c) Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this chapter which would be disclosed by such search."

STATEMENT OF THE CASE

Petitioner, driving a rented Hertz vehicle, stopped at an immigration check point on Interstate Highway 5, described as the "San Clemente Check Point"



by the driver of the auto.

II. Whether a conviction after trial by the Court, of Title 21 U.S.C. Section 841(a)(1), possession of marihuana with intent to distribute, requires proof of admissible evidence of scienter.

III. Whether an admission of defendant, gained by continuing questions by law enforcement agents shortly after defendant's refusal to discuss the crime, based upon his "Miranda" rights, may be admitted into evidence in a federal criminal trial.

STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 1357 of Title 8 U.S.C., in pertinent part, states:

and sometimes referred to as the "San Onofre, California Check Point", approximately five miles South of San Clemente, California.

Petitioner was directed to drive the vehicle to a secondary checking area and a border patrolman required petitioner to open the trunk of the vehicle so that a search for illegal aliens could be made. The trunk was filled with suitcases and, after ascertaining that no aliens were in the remaining space, ("approximately two feet deep and two feet high. Probably four to five feet wide." (R.T. 23-4)), the border patrolman alleged he smelled marihuana. Petitioner, over unequivocal objection, was required to open the suitcases; a quantity of marihuana was observed and seized.

Petitioner was then arrested. After being warned of his "Miranda Rights", he refused to give a statement. On the trip to the San Diego County Jail, petitioner was informed by the arresting agent of the



quantity of marihuana seized from the suitcases. Petitioner then stated "There's three (kilos) missing".

Pursuant to F.R. Crim.P. 41(e) petitioner moved to express the evidence and a hearing was held. Petitioner sought leave to demonstrate whether the odor of marihuana could be smelled under the circumstances described by the Border Patrol agent. The government had retained only a portion of the marihuana - approximately less then one-third of the original quantity (R.T. p.8) and the experiment could not be conducted. The court denied a motion to dismiss due to destruction of the evidence. (R.T. p.48). The motion to suppress was denied (R.T. p.52).

Petitioner waived jury trial and was found not guilty on Count I of the indictment, importation of marihuana, and guilty on Count II, possession, with intent



to distribute, marihuana.

Petitioner, age 23, was sentenced to a custodial term and a subsequent term of probation. He has been at liberty throughout the proceedings in the District Court and remains at liberty on bail pending disposition of proceedings in this Court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW HAS INCORRECTLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHALL BE, SETTLED BY THIS COURT AND WHICH QUESTION OF LAW WAS LEFT OPEN BY THE RECENT OPINION OF THIS COURT IN Almeida-Sanchez v. United States, -US-, 37 L.ed2 596 (1973).

This Court in Almeida-Sanchez, supra, expressed the view that "it is undoubtedly within the power of the Federal Government to exclude aliens from the country (and)... without doubt that this power can be effectuated by routine inspections and searches of indivi-



duals or conveyances seeking to cross our borders." -US-, 37 L.ed.2 at 602. The issue for review in the instant case does not question this point, but addresses itself to the permissible scope of intrusiveness of a routine border patrol conducted search. The Ninth Circuit holds, in petitioner's case, only that the check point involved is not that type condemned in Almeida-Sanchez. However, Almeida-Sanchez specifically notes - although it does not review - the problem raised here: "Whatever the permissible scope of intrusiveness of a routine border search might be, ..." -US-, 37 L.ed.2 at 602.

It is, of course, settled by case law and statute that a stop at the border and search by a border patrolman of an automobile may be made. The only purpose, according to the record, for the instant search was for illegal aliens. Further investigation, even if well founded, must be based upon the narrow exceptions to the warrant requirement

established in Carroll v. U.S., 267 US 132, 69 L.ed.2 543 (1925) and followed in Chambers v. Maroney, 399 US 42, 26 L.Ed.2d 419 (1970); Dyke v. Taylor Implement Mfg. Co., 391 US 216, 20 L.Ed.2d 538, (1968); Brinegar v. United States, 338 US 160, 93 L.Ed. 1879 (1949); and Husty v. United States, 282 US 694, 75 L.Ed. 629, (1931).

In Chambers v. Maroney, 399 US 42, 26 L.Ed.2d 419 (1970), Justice White stated:

> "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution."
>
> (emphasis added) 399 US at 51
> 26 L.Ed.2d at 428

Commendable as it may be to seek out, seize, arrest and prosecute possession of marihuana offenders, this interest must be curtailed by the limit of the power conferred by statute on border patrolmen and by limits on intrusiveness of searches without warrant.



The Border Patrol's "mission is to detect and prevent the smuggling and unlawful entry of aliens into the United States". Such mission involves "vehicle stops and, in a relatively few instances, a minimally intrusive physical inspection of the vehicle."[1/]

The government, in the instant case, did not suggest, and the record does not support, any probable cause to believe aliens were in the suitcases or even that marihuana was being brought into the US over this border. (Appellant was found not guilty of importation and there is nothing whatsoever in the record - not a scintilla of evidence - that petitioner, the vehicle, or the contraband had ever been in Mexico.)

1/ The two quotes are statements by the United States in the Brief for the United States, pp 32 and 37 in Almeida-Sanchez v. U.S., no. 71-6278, Oct. Term 1972.



Thus, even under the administrative inspection theory advanced in Camara v. Municipal Court, 387 US 523, 18 L.Ed.2d 930 (1967), See v. City of Seattle, 387 US 541, 18 L.Ed.2d 943 (1967), Colonnade Catering Corporation v. United States, 397 US 72, 25 L.Ed.2d 60, (1970), and United States v. Biswell, 406 US 311, 32 L.Ed.2d 87, (1972), the search here fails. In both Colonnade and Biswell, Justice White noted in Almeida-Sanchez,

> "the searching officers knew with certainty that the premises searched were in fact utilized for the sale of liquor or guns. In the present case, by contrast, there was no such assurance that the individual searched was within the proper scope of official scrutiny - that is, there was no reason whatever to believe that he or his automobile had even crossed the border, much less than he was guilty of the commission of an offense."
> -US-, 37 L.Ed.2d at 602.

The uncontested facts in petitioner's case are identical to the language just quoted. The issue is clearly defined and should be resolved: may the Border Patrol, over objection



of the petitioner, conduct a warrantless intrusive search for contraband without warrant after satisfactorily completing the "minimally intrusive" search for aliens allowed by law? Border Patrol authority for non-warrant searches is contained in Section 1357 of Title 8 U.S.C. Their authority is limited to searches for aliens or other grounds to exclude entry under Title 5. It is without contest that no evidence existed to show either petitioner, or the vehicle had been outside the US. (Even with what the search turned up, no evidence of travel outside the US existed.) Thus the conceded authority to search at the check point by the Border Patrol was exceeded.

2. THE DECISION BELOW HAS DECIDED FEDERAL QUESTIONS IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, E.G., Schneckloth v. Bustamonte, -US-, 36 L.Ed.2d 854 (1973), Chimel v. California, 395 US 752, 23 L.Ed.2d



685 (1969) AND HAS DECIDED THE QUESTION IN A WAY CONTRARY TO EXISTING STATUTES OF THE US.

Since a warrantless search may be justified on several exceptions to the warrant requirement, it is the government's burden to do so on any such ground available. While petitioner consented to drive his vehicle to a secondary inspection point and consented to the minimally intrusive search of the vehicle required by the Border Patrolman, he unequivocally refused consent to the search of the luggage. Schneckloth v. Bustamonte, -US-, 36 L.Ed.2d 854 (1973) clearly requires that to validate a warrantless search on the basis of consent, some showing of voluntariness must exist. Here petitioner refused. The Constitution requires no surrender of either freedom of movement or security and, absent a voluntary surrender of such rights, a search warrant is necessary. Schneckloth v. Bustamonte, -US-, 36 L.Ed.2d at 863, n.10 (1973).



The search cannot be justified as incident for an arrest, as no arrest was made until after the discovery of the marihuana. However, even assuming the smelling of the odor to give rise to probable cause to arrest, the scope of the search was outside the bounds of Chimel v. California. A warrant was still needed.

Petitioner refused unequivocally to discuss the case. He was advised of his "Miranda" Rights (Miranda v. Arizona, 384 US 436, 16 L.Ed.2d 694 (1966)). Thereafter, in the face of and with knowledge of petitioner's refusal to discuss the case, the Border Patrolman told petitioner of the weight of the contraband and elicited the incriminatory statement. This statement is the only substantial evidence linking the contraband to petitioner. This Court has not reviewed nor decided the question whether, when the warning is given and an



assertion of rights expressed, any subsequent interrogation may be conducted. Subsidiary to this are the questions whether repeated warnings must be given (See: Peo. v. Hill, 39 Ill.2d 125, 233 N.E.2d 367 (1968); Miller v. US, 396 F.2d 492 (8th Cir. 1968); Tucker v. US, 375 F.2d 365 (8th Cir. 1967); People v. Fioritto, 68 Cal.2d 714, 441 F.2d 625 (1968).

We do not deal here with questions of whether petitioner was in custody, the focus of the inquiry and whether a waiver was express or implied. An unequivocal refusal to talk, made after a proper warning of rights existed. The question is not only of concern to federal courts but has been the subject of scrutiny in the state courts and should be parsed. cf. State v. Lane, 77 Wash. 2d 860 467 P.2d 304 (1970).

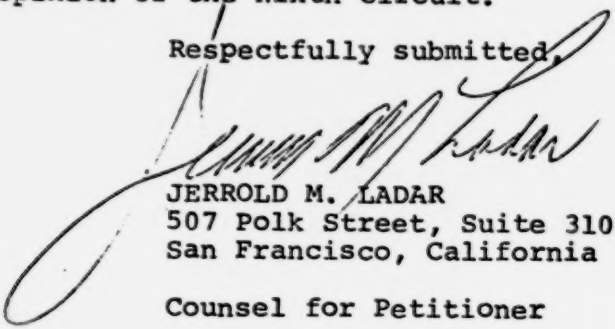
CONCLUSION

For these reasons, a writ of certiorari should issue to review the



judgment and opinion of the Ninth Circuit.

Respectfully submitted,



JERROLD M. LADAR
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Counsel for Petitioner

September 7, 1973.



IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCIS ANTHONY RAGUSA,

Defendant-Appellant.

No. 73-1314

FILED

JUL 11 1973

DENNIS P. MATHEWS, CLERK
U. S. COURT OF APPEALS

ORDER

Before: BARNES and WALLACE, Circuit Judges, and BYRNE,* District Judge.

On June 13, 1973, we ordered that this appeal await submission until the Supreme Court of the United States determined the case of Almeida-Sanchez v. United States, No. 71-6278.

We order that this case stand submitted as of June 22, 1973, and now hold Almeida is not here controlling. Almeida pertained to "a roving search."

> "It was not a border search, nor can it be said to have been a search conducted at the 'functional equivalent' of the border. Nor does [it] involve the constitutional propriety of searches at permanent or temporary check points removed from the border or its functional equivalent. Nor finally, was the search based on cause in the ordinary sense of specific knowledge concerning an automobile or its passengers."

(Concurring opinion of Mr. Justice Powell). C.C.H., p. 3731. Cf. United States v. Barron, 472 F.2d 1215, 1217, Note 2. (9th Cir. 1973).

Here, the stop, search and arrest was at the

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*Honorable William M. Byrne, Sr., United States District Judge, Central District of California, sitting by designation.

Exhibit One of Two



permanent check point on Highway 5, "at San Clemente check point" (R.T. 11), sometimes referred to as the San Onofre, California check point, 5 miles south of San Clemente, California.

The judgment of conviction is affirmed.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

FRANCIS ANTHONY RAGUSA, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 1973, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to The Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530, Counsel for Respondent. I further certify that all parties required to be served have been served.

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SUPREME COURT, U. S.
No. 73-458

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NOV 5 1973
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In the Supreme Court of the United States

OCTOBER TERM, 1973

FRANCIS ANTHONY RAGUSA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-458

FRANCIS ANTHONY RAGUSA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment filed in the United States District Court for the Southern District of California charged petitioner with unlawfully importing 167 pounds of marihuana and possession of that marihuana with intent to distribute it, in violation of 21 U.S.C. 960 and 841(a). After a non-jury trial, petitioner was acquitted on the importation count and convicted on the possession count. He was sentenced to imprisonment for 90 days, to be followed by probation for three years. The court of appeals affirmed (Pet. App.).

The pertinent evidence, adduced at a pretrial hearing on petitioner's motion to suppress and at trial, showed that at 3:05 a.m. on July 9, 1972, a rented vehicle driven by petitioner and containing a female passenger appeared at the established Border Patrol checkpoint lo-

cated five miles south of San Clemente, California (Tr. 11-12).[1] Petitioner was referred to a secondary search area, manned by Border Patrol officers Falkowski and Holman. At the officers' request, petitioner opened the trunk of the car, which contained four suitcases. Falkowski asked petitioner if he was travelling, and he responded that he was on his honeymoon. Falkowski then walked to the front of the car and asked the passenger if she was married; the woman replied that she was not (Tr. 13-15).

The four suitcases were stacked in such a manner as to cover the full width of the front of the trunk, leaving a large gap (about two feet deep, two feet high, and four to five feet wide) between the back of the suitcases and the rear seat of the vehicle (Tr. 22-24). Using a flashlight, Officer Holman attempted to examine the rear space for the presence of aliens. In order to do so, he bent down into the trunk and positioned his head next to the suitcases to enable him to peer into the rear space, with his head "an inch or less" from one of the suitcases (Tr. 24-30). At this point, Holman detected the distinct odor of marihuana emanating from the inside of that suitcase (Tr. 24). Petitioner was asked to open the suitcase and declined to do so. The agent then opened it and discovered bricks of marihuana inside (Tr. 25). The remaining suitcases were opened, and the agents counted a total of 73 one-kilogram bricks of marihuana (Tr. 28-29).

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[1] "Tr." designates the transcript of the proceedings before the district court, a copy of which we are lodging with the Clerk of this Court.

After he was arrested and advised of his *Miranda* rights, petitioner was transported to the San Diego City Jail. En route, petitioner asked customs agent Ron Lacey how many kilos had been found in the suitcases. When Lacey replied that there were 73 kilos, petitioner remarked, "There's three missing" (Tr. 46). Later, the bricks were recounted, and the number seized was in fact determined to be 76 (Tr. 47).

1. Relying upon *Almeida-Sanchez* v. *United States*, No. 71-6278, decided June 21, 1973, petitioner claims that the warrantless search of his suitcases at the San Clemente checkpoint was unlawful.[2] The court of appeals, however, correctly concluded that *Almeida-Sanchez* does not control this case. This Court there held unlawful a search conducted pursuant to a roving patrol on a deserted east-west road "that lies at all points at least 20 miles north of the Mexican border" (slip op. 7). By contrast, petitioner's vehicle was stopped at a permanent Border Patrol checkpoint on Interstate Route 5, a well-travelled highway which has long carried a large proportion of the traffic between Tijuana, Mexico, and Los Angeles. See *Fernandez* v. *United States*, 321 F. 2d 283, 286 (C.A. 9). *Almeida-Sanchez* did not "involve the constitutional propriety of searches at permanent or temporary check points removed from the border or its functional equivalent" (slip op. 2, Powell, J., concurring). The routine checkpoint stop in this case, unlike a warrantless roving patrol stop, did not occur on a lonely road without warning to the motorist, and it did not present a substantial risk that the Border Patrol officers

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[2] The government has never asserted that the search of the suitcases was premised upon petitioner's consent. Thus, there is no need to consider his argument (Pet. 12-15) that he did not consent to the search.

would abuse their "unfettered discretion" (*Almeida-Sanchez*, slip op. 4). Nor has petitioner claimed that there was any such abuse.

Once the vehicle had been stopped by the officers, pursuant to their authority under 8 U.S.C. 1357(a) to conduct warrantless searches of automobiles for illegal aliens within a reasonable distance of the border, the officers acted reasonably in inspecting the trunk after receiving inconsistent responses from petitioner and his passenger. They also acted reasonably in looking into the large space created by the unorthodox stacking of the suitcases. It was while in the proper course of checking that space for the presence of concealed aliens that officer Holman detected the odor of marihuana, which in turn clearly gave him probable cause to believe that an offense was being committed. The search of the suitcases was therefore proper.[3]

---

[3] Moreover, even if the ruling in *Almeida-Sanchez* applies to permanent checkpoint stops, there is no reason to apply it retroactively to searches that occurred prior to the date of the decision. The case involved a new application of the Fourth Amendment's exclusionary rule, which is designed, not to ensure a "'fair determination' of * * * guilt or innocence" (*Roberts* v. *Russell*, 392 U.S. 293, 294) or to preserve the "integrity of the fact-finding process" (*Linkletter* v. *Walker*, 381 U.S. 618, 639), but to deter unlawful police conduct. Applying the decision retroactively would serve no deterrent purpose.

Although no prior Supreme Court decision was overruled in *Almeida-Sanchez*, the Border Patrol had for many years made vehicular stops on roving patrols and at established checkpoints pursuant to statutory authority (8 U.S.C. 1357(a)), and the courts of appeals had uniformly upheld the validity of those practices. In these circumstances, this Court's retroactivity decisions make clear that *Almeida-Sanchez* should operate only prospectively. See, *e.g.*, *Desist* v. *United States*, 394 U.S. 244; *Williams* v. *United States*, 401 U.S. 646. Cf. *Michigan* v. *Payne*, No. 71-1005, decided May 21, 1973.

2. Petitioner also claims that the statement he made while being transported to the San Diego Jail should not have been received in evidence, because it was made after he had expressed his desire to remain silent. We note that petitioner did not challenge the admissibility of this statement in the lower courts. In any event, petitioner himself initiated the conversation and freely made the incriminating statement after the officer answered his question. Petitioner's Fifth Amendment rights were in no way compromised. See *United States* v. *Anthony*, 474 F. 2d 770 (C.A. 5).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

1001-1973-11